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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, in light of the general saving provision, 1 U.S.C. 109, the amendments made to certain provisions of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1216 (1968), by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), apply to cases pending in the federal courts after the effective date of the FOPA which have arisen from acts committed prior to that date.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 813 F.2d 212 (9th Cir. 1987). The order denying rehearing (App. A) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1987; a timely petition for rehearing was denied on September 16, 1987, with one judge dissenting and stating that he would reverse the conviction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986).

Section 1. Short Title and Congressional Findings.

* * * *

(b) Congressional Findings.—The Congress finds that—

(1) the rights of citizens—

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and ~~tenth~~ amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.".

Sec. 101. AMENDMENTS TO SECTION 921.

Section 921 of title 18 United States Code, is amended—

* * * *

(6) in subsection (a), by inserting after paragraph (20) the following new paragraphs:

"(21) The term 'engaged in the business' means—

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principle objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

* * * *

Sec. 102. AMENDMENTS TO SECTION 922.

Section 922 of title 18, United States Code, is amended—

(1) so that paragraph (1) of subsection (a) reads as follows:

"(1) for any person—

"(A) Except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms . . . .

* * * *

Sec. 110. EFFECTIVE DATE.

(a) In General.—The amendments made by this Act shall become effective one hundred and eighty days after the date of enactment of this

Act. Upon their becoming effective, the Secretary shall publish and provide to all licensees a compilation of the State laws and published ordinances of which licensees are presumed to have knowledge pursuant to chapter 44 of title 18, United States Code, as amended by this Act.

* * * *

(b) Pending Actions, Petitions, and Appellate Proceedings.—

The amendments made by sections 103(6)(B), 105, and 107 of this Act shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act.

18 U.S.C. 922. Unlawful acts. (1985)

(a) It shall be unlawful—

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition . . . .

* * * *

1 U.S.C. 109.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

Donald Douglas Breier, a gun collector who owns a design telecommunications system company, was indicted on January 31, 1986 on five counts of violating 18 U.S.C. 922(a)(1), unlicensed dealing in firearms, based upon the sale of five firearms in September and November, 1985 at various public gun shows where Breier rented tables. A jury trial commenced on April 1, 1986 and Breier was convicted by the jury on all five counts. On

May 11, 1986, Breier was sentenced to a term of 45 days in the custody of the Attorney General, three years probation, and a $5,000 fine. Eight days later, on May 19, 1986, the President signed into law the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), most provisions of which—including the amendments to § 922(a)(1) and § 921(a)—became effective 180 days after enactment, i.e., November 15, 1986.

On May 20, 1986, Breier timely filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit which, on February 2, 1987, heard oral argument. In his briefs and oral argument, Breier contended that the amendments made by the FOPA to § 922(a)(1) and § 921(a) required that his conviction be reversed since, under the amended provisions, he would have not been convicted. After the Court of Appeals, on March 16, 1987, filed its opinion affirming Breier's conviction on the ground that the FOPA did not apply to his case in light of the general federal saving clause, 1 U.S.C. 109, Breier petitioned for rehearing. Following a July 31, 1987 order of the Court of Appeals that the parties submit supplemental briefs on whether it was the intent of Congress to apply the amendments made by the FOPA to cases pending after November 15, 1986 which arose from acts committed prior to that date, Breier's petition for rehearing was denied on September 16, 1987, with Judge Noonan dissenting and voting to reverse Breier's conviction.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH *UNITED STATES v. ORELLANES*, 809 F.2d 1526 (11th Cir. 1987)

In its opinion affirming Breier's conviction, the Court of Appeals held that the amendment made by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), to 18 U.S.C. 921(a)—the addition of an express statutory definition of the term "engaged

in the business"—did not apply to Breier's case in light of the general federal saving clause, 1 U.S.C. 109, as the acts Breier committed which gave rise to the charges against him had been committed prior to the effective date of the FOPA. 813 F.2d at 215-6. In reaching this conclusion, the Court of Appeals placed itself in direct conflict with the Court of Appeals for the Eleventh Circuit in *United States v. Orellanes*, 809 F.2d 1526 (11th Cir. 1987), which determined that the amendments made by the FOPA applied to cases pending after the effective date of the FOPA.[1]

In *Orellanes*, the Eleventh Circuit was faced with the question of whether the amendment made by the FOPA to 18 U.S.C. 921(a)(20)—the definition of the term "crime punishable by imprisonment for a term exceeding one year" as used in 18 U.S.C. 922(h)(1)[2]—applied to Orellanes' case since the acts he committed which gave rise to the indictment—receipt of firearms and ammunition by a convicted felon—occurred prior to November 15, 1986, the effective date of the FOPA. After noting that § 101(5) of the FOPA—the amendment to 18 U.S.C. 921(a)(20)—expressly required that whether a previous state conviction constituted a "conviction" for purposes of § 922(h)(1) was a question of state—not federal—law, the Eleventh Circuit stated "[w]e now turn to Florida law, as P.L. 99-308, § 101(5) instructs, in our effort to determine whether Orellanes was properly characterized as a 'convicted felon.'" 809 F.2d at 1528. Thus, the Eleventh Circuit plainly recognized that the amend-

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[1] Orellanes was indicted on October 29, 1985, convicted on February 2, 1986, and sentenced on April 25, 1986. Oral argument in the Court of Appeals was held on November 18, 1986 and the decision of the Court of Appeals was filed on February 17, 1987.

[2] § 922(h)(1) as it existed when Orellanes was indicted, tried, convicted, and sentenced made it "unlawful for any person—(1) who . . . has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

ments made by the FOPA applied to cases pending after November 15, 1986 even if the acts giving rise to the case occurred prior to that date.[3]

It is important to note that the Eleventh Circuit in *Orellanes* was well aware of the general federal saving clause, 1 U.S.C. 109, when it held that the amendments made by the FOPA apply to cases pending after the effective date of the FOPA. The court's awareness is evident from the fact that, after holding that the FOPA-amended definition of § 921(a)(20) should apply, it rejected, on the basis of 1 U.S.C. 109, Orellanes' contention "that upon the effective date of section 101(5) of P.L. 99-308, his entire prosecution will abate. . . .", 809 F.2d at 1528. Thus, even in light of 1 U.S.C. 109, and in direct conflict with the Ninth Circuit in the instant case, the Eleventh Circuit has held that the amendments made by the FOPA apply to cases pending after the effective date of the FOPA.[4]

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[3] In holding as it did, the Eleventh Circuit agreed with the District Court for the Southern District of Texas in *United States v. Adair*, 649 F. Supp. 61 (S.D. Tex. 1986), which held that the amendments made by the FOPA applied to a case pending after the effective date of the FOPA where the acts giving rise to the case occurred prior to the effective date. In *Adair*, the Government conceded that, if the prosecution "had originally proceeded under the unamended [18 U.S.C.] § 922, then the redefinition of 'conviction' would have become available after November 15, 1986, to the Defendant as a defense at his trial." 649 F. Supp. at 62. As a result, the district court decided it could not "save [18 U.S.C. App.] § 1202(a) and not give recognition to the redefinition of 'conviction' " since to do so would "frustrate congressional intention . . . .", 649 F. Supp. at 62. Moreover, the District Court rejected the Government's argument that the prosecution was saved by the general federal saving clause since "1 U.S.C. § 109 was clearly not intended to result in a frustration of congressional intention . . . .", 649 F. Supp. at 62.

[4] Contrary to the assertion of the Ninth Circuit that the Second Circuit, in *United States v. Carter*, 801 F.2d 78 (2nd Cir. 1986), *cert. den.*, —— U.S. —— (1986), "was presented with the precise question at issue" (813 F.2d at 216) in *Breier*, *Carter* was *not*

To resolve this conflict, this Court should grant Breier a Writ of Certiorari to review the decision of the Court of Appeals.

II. THE ANALYTICAL PROCESS TO BE USED IN APPLYING THE GENERAL SAVING PROVISION, 1 U.S.C. 109, IS NOT SETTLED NOR HAS THIS COURT SETTLED THE QUESTION OF THE EFFECT OF THAT PROVISION ON AN ACT AMENDING A PENAL STATUTE, SUCH AS THE FIREARMS OWNERS' PROTECTION ACT, WHICH DOES NOT INCLUDE A SAVING CLAUSE BUT DOES INCLUDE CONGRESSIONAL FINDINGS EXPRESSING THE NEED FOR THE AMENDMENTS AS WELL AS AN EFFECTIVE DATE PROVISION RELATING TO CERTAIN TYPES OF PENDING CASES

Introduction

While this Court has spoken to the application of the general federal saving provision, 1 U.S.C. 109, on a handful of occasions since its original enactment in 1871, those decisions taken together do not establish a clear analytical process for the federal courts to follow in applying the general federal saving provision. Moreover, this Court has never dealt with the general saving provision in the context of a statutory scheme of the type in this case: where the amending act does not include a saving clause but does include congressional findings expressing the need for the amending act (see, § 1(b) of the FOPA) as well as a provision, in the effective date section of the amending act, applying certain amendments to cases pending on the date of enactment. See, § 110(b) of the FOPA. To settle this area of federal law, the Court should grant Breier's petition.

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pending after the effective date of the FOPA, November 15, 1986, as it was decided two months earlier, on September 11, 1986.

The Development of This Court's General Saving Provision Jurisprudence

A review of this Court's decisions concerning the general saving provision must begin with *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1871), where this Court held in substance

> that, under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and release from prosecution therefor after such repeal, unless there be either a clause in the repealing statute, or a provision of some other statue, expressly authorizing such prosecution. *United States v. Reisinger*, 128 U.S. 398, 401 (1888).

In response to *Tynen*,

> Congress enacted its first general saving provision, c. 71, 16 Stat. 432 (1871), to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them." *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974), *reh'g den.*, 419 U.S. 1014 (1974).

Following the enactment of the general saving provision, this Court's first consideration of it arose in *Reisinger*, where it was decided only that "the saving clause's use of the words 'penalty,' 'liability,' and 'forfeiture' required the conclusion that the clause covered criminal statutes." *Marrero*, 417 U.S. at 661.

In *Reisinger*, this Court had before it a case arising from acts committed in 1883 which violated a federal statute enacted in 1878 but which had been "expressly repealed by the act of July 4th, 1884. . . ." 128 U.S. at 400. As the defendant was not indicted until April, 1885, almost a year after the statute pursuant to which he was charged was repealed, he contended that the repeal of the statute "operate[d] as a remission of all

penalties. . . " 128 U.S. at 401. The repealing act of 1884 having not included "any saving clause or reservation of the right to prosecute or punish for offenses in violation of" the repealed statute or any other expression on congressional intent, the general saving provision was applied. 128 U.S. at 400-1. To apply the general saving provision properly, this Court held that it was necessary "to read the act of 1884 in connection with [the general saving clause] as one act." 128 U.S. at 401. From such an application of the general saving provision, it was readily apparent that Reisinger's prosecution did not abate.

Twenty years after *Reisinger*, this Court again dealt with the general saving provision. Unlike in *Reisinger*, however, the repealing act in *Great Northern Railway Company v. United States*, 208 U.S. 452 (1908) included a limited saving clause "solely addressed to the remedies to be applied in the future carrying on of [pending] cases." 208 U.S. at 467-8. Faced with the defendants' contention that such a saving clause "manifest[ed] the intention of Congress that no offenses theretofore committed against the [repealed] act should be prosecuted, unless a prosecution was then pending," 208 U.S. at 464, this Court expanded upon the analytical process to be applied in cases involving the general saving provision that it had only briefly addressed in *Reisinger*. This Court thus stated that, as the general saving provision

> has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of [the general saving clause] are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of

> the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provision of [the general saving clause]. 208 U.S. at 465.

Applying that analytical process to the case before it, this Court reviewed the only indication of congressional intent available, the precise language of the repealing act's saving clause,[5] finding that it did not "expressly or by fair implication, conflict with the general rule established by [the general saving provision]," 208 U.S. at 466, and that it "serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts. . . ." 208 U.S. at 467. It was, therefore, "the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts." 208 U.S. at 467. As a result of its understanding of Congress' intent, as expressed in the language of the repealing statute's saving clause, this Court concluded that it was not "the intention of Congress to depart from the general principle expressed in" the general saving provision and held that prosecutions for acts committed prior to the effective date of the repealing act were not abated. 208 U.S. at 469.

Hertz v. Woodman, 218 U.S. 205 (1910), followed on the heels of *Great Northern Railway Company*. Like *Great Northern Railway Company*, *Hertz* involved a repealing act which included a saving clause. And, as in *Reisinger* and *Great Northern Railway Company*, *Hertz*

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[5] "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion *in the manner* heretofore provided by law." (emphasis added). 208 U.S. at 466.

held that the general saving provision was "a rule of construction . . . to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress." 218 U.S. at 217. Because the general saving provision was nothing more than "a rule of construction," it was observed that, if the repealing act's saving clause "necessarily, or by clear implication, conflicts with the general rule declared in [the general saving provision], the latest expression of legislative will must prevail." 218 U.S. at 218. Apparently finding that the repealing act's saving clause did not conflict with the general saving provision nor "by plain implication" did the repealing act's saving clause "cut[] down the scope and operation of the general rule in [the general saving provision]," 218 U.S. at 218, *Hertz* concluded only that the tax liability sought to be avoided "was saved by the saving clause of the repealing act." 218 U.S. at 224. Thus, other than reiterating the analytical process set forth in *Great Northern Railway Company*, *Hertz* added nothing to the jurisprudence of the general saving provision.

More than fifty years after *Hertz*, in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), this Court was faced with determining whether the federal Civil Rights Act, which generally preempted and nullified certain state penal statutes—such as the one under which Hamm had been prosecuted and convicted—abated pending state prosecutions.

Considering "first the effect the Civil Rights Act would have on petitioners' convictions if they had been federal convictions," 379 U.S. at 312, *Hamm* observed preliminarily that the common law rule regarding repeal of a penal statute exemplified by *Tynen*, *supra*, and set forth in *Reisinger*, *supra* "does not depend on the imputation of a specific intention to Congress in any particular statute," but rather "takes the more general form of imputing to Congress an intention to avoid inflicting punish-

ment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." 379 U.S. at 313. In so many words, *Hamm* thus reiterated that there is a presumption that repeal of a penal statute abates prosecutions. As a result, *Hamm* held that the absence in the Civil Rights Act of a provision expressly abating prosecutions was "irrelevant" in determining whether the Civil Rights Act abated prosecutions.

This Court then turned to the federal saving provision —then, as now, codified in 1 U.S.C. 109—to determine if it "would nullify abatement of a federal conviction." 379 U.S. at 314. By-passing the analytical process mostly recently set forth in *Hertz*, *Hamm* concluded that the general federal saving provision would not "nullify abatement of a federal conviction" since the purpose of the federal saving provision was "to obviate mere technical abatement. . . ." 397 U.S. at 314.[6]

In by-passing the use of the analytical process set forth most recently in *Hertz*, this Court apparently adopted a new analytical process wherein the question for resolution in applying the general saving provision was not to determine "the will and intent of Congress," *Hertz*, 218 U.S. at 217, but rather to determine whether a repealing act "technically abated" prosecutions. In establishing this analytical process, this Court disturbed what, until *Hamm*, was settled law, particularly as the *Hamm* analytical process is dependent upon the meaning of the phrase "mere technical abatement."

While *Hamm* did not explain what the phrase "mere technical abatement" meant, in view of the citation of

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[6] Having concluded that the general saving provision would not "nullify abatement of a federal conviction," *Hamm* held that it would also not nullify abatement of a state conviction as the distinction between federal and state convictions was "a distinction without a difference." 379 U.S. at 314.

Tynen, it appears to contemplate that the general saving provision is limited solely to nullifying abatement where there was an amendment to a penal statute effectively increasing penalties. Conversely, it appears that this Court in *Hamm* contemplated that amendments to penal statutes which made lawful conduct which was previously unlawful would not be affected by the general saving provision and thus such amendments *were* to abate prosecutions in the absence of express congressional direction, since "the principle of abatement is so firmly imbedded in our jurisprudence as to be a necessary and proper part of every statute working a repealer of criminal legislation." 379 U.S. at 316. Such an understanding of the general saving provision leaves open a very wide area of uncertainty as to its effect and casts into doubt the continued vitality of the analytical process of *Hertz* and its predecessors.[7] Indeed, as Justice Black noted in dissent,

> the Court has now put back on Congress the burden of spelling out expressly, statute by statute, in laws passed hereafter that it does not want to upset convictions for past crimes, a burden which Congress renounced nearly 100 years ago and which it did not know it had when it passed the 1964 Act. 379 U.S. at 320 (Black, J., dissenting).[8]

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[7] *Hamm's* reference to the fact that "Congress . . . clearly intended to eradicate an unhapply chapter in our history," 379 U.S. at 315, is not sufficient to suggest that, after *Hamm*, the *Hertz* analytical process had continuing vitality since this statement reflects only this Court's understanding of congressional intention regarding the overall purpose of the Civil Rights Act, not regarding a more specific intention as to pending cases. This is particularly true in view of the fact that *Hamm* nowhere mentions *Hertz* or *Great Northern Railway Company*.

[8] A relatively recent district court opinion, in reviewing the current jurisprudence of the general saving provision, cogently observed that *Hamm* "virtually st[oo]d the language of § 109 on its head . . . ." *United States v. Jimicum*, 608 F. Supp. 1530, 1538 (E.D. Was. 1985), *rev'd sub. nom. United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. den.*, —— U.S. —— (1987).

Distinguishing *Hamm, Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), held that the general saving provision nullified abatement of the prosecution of a union and three of its officers for conspiring to make unlawful political contributions where the prosecution was brought pursuant to a statute which had been amended while the case was pending before this Court. Like in *Reisinger* and *Hamm*, but in contrast to *Great Northern Railway Company* and *Hertz*, the amending act in *Pipefitters* did not include a saving clause. Thus, this Court first turned to the legislative history of the amending act to determine if there was any congressional intent to "overcome" the common law presumption continuously recognized from *Tynen* to *Hamm*. 407 U.S. at 432. That effort led to the conclusion that Congress did not intend in enacting the amending act to nullify the presumption that prosecution would abate.

This Court next turned to the general saving provision, holding that it "operates to nullify any abatement of the prosecution." 407 U.S. at 433. In utilizing such an analytical process, *Pipefitters* appears to have revived, at least to a degree, the analytical process set forth in *Great Northern Railway Company* and *Hertz*. Yet, in distinguishing, not overruling *Hamm*, it also appears that the *Hamm* analytical process retains at least some vitality and that, in some cases involving a non-technical amendment—i.e., an amendment that redefines what conduct is unlawful—the general saving provision would not apply. Indeed, in noting that the general saving provision nullified abatement of the prosecution because the amending act "retains the *basic offense*" (emphasis added), 407 U.S. at 435, this Court not only appears to have approved *Hamm* but possibly to have created a third analytical process to be utilized in determining the effect of the general saving provision.

The most recent case from this Court dealing with the general saving provision is *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974), *reh'g den.* 419

U.S. 1014 (1974). Like *Great Northern Railway Company* and *Hertz*, the repealing act in *Marrero* included a saving clause. After holding that the saving clause of the repealing act preserved the penalty structure—non-eligibility for parole—which Marrero argued did not apply after the effective date of the repealing act, this Court turned to the question of the effect on Marrero's sentence of the general saving provision.

Apparently believing that application of the general saving provision was not precluded because of contrary congressional intent, there being "no conflict," 417 U.S. at 659, n.10, between the repealing act's saving clause and the general saving provision and no other expression of congressional intent on the issue, this Court proceeded directly, without mentioning the analytical process to be applied, to the issue before it: the narrow question of whether "the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole under 18 U.S.C. § 4204 is a 'penalty, forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109." 417 U.S. at 660. Recognizing that the general saving provision "does not ordinarily preserve discarded remedies or procedures," 417 U.S. at 441, *Marrero* held that "the legislative history of § 7237(d) reveals that Congress meant ineligibility for parole to be treated as part of the 'punishment' for the narcctics offenses for which respondent was convicted." 417 U.S. at 661-2. Thus, this Court found that the parole ineligibility provision was an element of punishment, resulting in the conclusion that it was "saved from release or extinguishment" by the general saving provision. 417 U.S. at 661.

In sum, therefore, *Marrero* sheds no light on the current state of the analytical process to be utilized in determining the effect of the general saving clause.[9] It

[9] After reviewing "those post-*Marrero* decisions which have been published," the district court in *Jimicum*, 608 F. Supp. at 1539, observed that those decisions "may be broken down into three broad categories: (1) those which have embraced a strict, technical, and

is thus plain that *Pipefitters* was the last case in which this Court expressed any view of the analytical process to be used in determining the effect of the general saving provision.

CONCLUSION

From the above discussion, it is clear that federal law regarding the analytical process to be used in applying the general saving provision is not settled. Moreover, how this Court would address a statutory scheme such as the one presented by this case—where there are congressional findings in the amending act expressing the need for the act (See, § 1(b) of the FOPA) as well as language in the effective date provision of the amending act applying certain amendments to cases pending on the date of enactment (See, § 110(b) of the FOPA)—is uncertain, since this Court has never before dealt with a statutory scheme similar to the one in the instant case. To settle these issues, it is appropriate for this Court to grant a writ of certiorari in this case.

Respectfully submitted,

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literal approach in applying § 109 with undeviating harshness; (footnote omitted) (2) those which have adopted a considerably more flexible approach based on the totality of the circumstances surrounding a given piece of legislation (footnote omitted); and (3) those which have not really taken a stance on the role of § 109 in modern-day statutory construction, but which at the same time, have exhibited remarkable creativity in avoiding that precise question (footnote omitted)." 608 F. Supp. at 1539. The cases from which these categories were derived are found in footnotes 10, 11, and 12 of the district court's opinion.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5140

D.C. No. CR-86-0094-AHS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD DOUGLAS BREIER,
Defendant-Appellant.

ORDER AND DISSENT

Filed September 16, 1987

Before: Joseph T. Sneed, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Dissent by Judge Noonan

COUNSEL

Charles C. Lee, Los Angeles, California, for the plaintiff-appellee.

Theodora Poloynis-Engen, Alexander W. Kirkpatrick, Pasadena, California, for the defendant-appellant.

ORDER

Appellant's petition for rehearing is denied. Judge Noonan's dissent from the denial of the petition for rehearing is attached.

DISSENT

NOONAN, Circuit Judge, dissenting from denial of rehearing:

Donald Douglas Breier is a hobbyist who has been turned into a criminal by the too vivid zeal of government agents and prosecutors. Like many others hobbyists—stamp collectors for example—he swapped parts of his collection and sold and bought other parts. Admittedly guns are more dangerous than stamps, and Congress has seen fit to regulate gun dealers. But unlike stamps, guns are the subject of constitutional protection: "the right of the people to keep and bear arms shall not be infringed." United States Constitution, Amendment II. Congress has regulated guns, sensitive to the Second Amendment and to the difference between hobbyists and those making a living out of the gun business.

The Committee on the Judiciary took formal note of the complaint that "enforcement of the Gun Control Act had been overzealous." H.R. Rep. No. 99-495 (1986), 99th Cong., 2nd Sess. *reprinted, U.S. Code Cong. & Ad. News*, 1327, 1329. In the light of such complaint and other testimony, the Judiciary Commission reported, and Congresss enacted, legislation pointedly entitled "Firearms Owners' Protection Act", 100 Stat. 449 (1986). The Act begins with two congressional findings. First, Congress finds that Second Amendment and other constitutional rights of citizens "require additional legislation to correct existing firearms statutes *and enforcement policies* (emphasis supplied). Second, Congress finds that:

> . . . additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the

> purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." 100 Stat. 449 (1986).

After making these findings Congress went on to amend 18 U.S.C. § 921 by *inter alia* defining the term "engaged in business." The definition sets out that to be a dealer one must have "the principal objective of livelihood and profit" from the trade.

Called upon to construe 18 U.S.C. § 921 in the light of the Firearms Owners' Protection Act, a court should not hesitate to respond to the congressional concern of correcting existing enforcement policy, and a court should not fail to acknowledge the explicit declaration that Congress in this legislature is reaffirming the intent of the Gun Control Act of 1968. The 1986 amendment makes crystal-clear how the old statute should be read: the law was not meant to reach the hobbyist who is not making his living out of trading in guns.

The opinion of the court relies on 1 U.S.C. § 109. *United States v. Breier*, 813 F.2d 212, 214 (9th Cir. 1987). The statute is addressed to "the repeal of any statute." It is not obvious that the Firearms Owners' Protection Act is, in general or in the particular section on dealers, a repealing statute; certainly the terms "repeal" is not employed and the text of the Act did not alert Congress to the possibility that its legislative clarification of particular subsections of earlier law would be read in conjunction with the statute on the repeal of a statute.

The repeals statute is in any case applicable only to "penalties, forfeitures or liabilities." A change in the

definition of the terms of a statute is not a change in a "penalty, forfeiture or liability." Those terms are "synonymous with the word punishment in connection with crimes of the highest grade." *United States v. Reisinger*, 128 U.S. 398 (1888). Neither the Supreme Court nor this Circuit is to the contrary. Rather, the federal savings clause has been carefully applied where a real penalty has been changed and the old penalty must be preserved. *Warden v. Marrero*, 417 U.S. 653, 660 (1974); *White v. Warden*, 566 F.2d 57, 59 (9th Cir. 1977). There is no basis in controlling authority for the court's expansive reading that treats a definitional adjustment as the extinguishment of a penalty.

Nor is there any social justification for the court's gloss on the statute. When it is clear, by congressional amendment, that a statute was never meant to punish certain conduct and never will again punish that conduct in the future, what is the point of punishing someone for its violation? Deterrence is not served since the crime can never be committed again. Restraint is unnecessary for the conduct is now legal. Retribution cannot be served because any predisposition to repeat the act will be to repeat an act no longer criminal. Deterrence is not achieved because there is no need to dissuade others from committing what is no longer a crime. *Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 149 (1972).

The court falls back on a second level of analysis, contending that retroactivity would be "plainly contrary to Congress's intent" because Congress explicitly provided that the amendments did not become effective until November 15, 1986. *Breier*, *supra* at 216, invoking *United States v. Carter*, 801 F.2d 78 (2nd Cir.), *cert. denied*, 107 S.Ct. 657 (1986). Reliance on an inference made from the statute's effective date is misplaced. The intention of Congress does not need to be inferred. Congres-

sional intention is explicitly stated in the findings that introduce the statute.

In light of that strong and clear expression, it is incumbent on us to interpret the new law as a clarification of the old, not as a repeal. To say that retroactivity is plainly contrary to Congress' intent is to put implication and inference above explicitness and specificity; to honor the congressional will in word and ignore it in deed; to disappoint the hopes and thwart the purpose of the sponsors of the legislation which the court purports to interpret.

My reading of the statute leads me to address the government's fall-back position that even in terms of the 1986 amendments Breier is guilty. The court notes that Breier owns a design telecommunications system, and it does not dispute Breier's claim that he realized a net loss on his firearm dealings. The evidence did not show him to be one who devoted "time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit." Even if it were granted that he might have sought profit, he did not seek his livelihood in this way. Breier was not a dealer.

To recapitulate: the court inexplicably prefers to divine congressional intent by inference from a general statute not in terms applicable; it ignores the clear expression of congressional intent in a recent relevant statute clarifying the earlier law; and it achieves the socially regressive objective of punishing a person for conduct that is now not criminal.

I repent my earlier concurrence and would reverse Breier's conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-5140

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD DOUGLAS BREIER,
Defendant-Appellant.

Argued and Submitted Feb. 2, 1987

Decided March 16, 1987

Concurrence Filed March 23, 1987

Appeal from the United States District Court
for the Central District of California

Charles C. Lee, Los Angeles, Cal., for plaintiff-appellee.

Theodora Poloynis-Engen, Alexander W. Kirkpatrick, Pasadena, Cal., for defendant-appellant.

Before SNEED, FARRIS and NOONAN, Circuit Judges.

SNEED, Circuit Judge:

Donald Breier appeals from his conviction of five violations of 18 U.S.C. § 922(a)(1), unlicensed dealing in

firearms. Breier argues that the recently-enacted Firearms Owners' Protection Act should apply retroactively to his case, thereby warranting a new trial. Because we find that the federal savings clause, 1 U.S.C. § 109, mandates non-retroactivity, we affirm the judgment of conviction.

I.

FACTS AND PROCEEDINGS BELOW

Donald Breier owns a design telecommunications system company, and has a keen interest in firearms. Beginning sometime in the summer of 1984, Breier began renting tables at gun shows, where he engaged in the trading, selling and purchasing of firearms. In April, 1985, agent Dan Smith of the Bureau of Alcohol, Tobacco and Firearms (ATF) began investigating the defendant after receiving information that Breier was trading in firearms on a regular basis. Smith spoke with Breier over the telephone on April 19, and warned him he was required to obtain a federal firearms license if he was buying or selling firearms on any sort of regular basis. Breier assured Smith that he was a collector only, and was not regularly trading in firearms.

The ATF investigation into Breier's activities continued. Over the next year and a half, Agent Smith and other ATF agents attended gun shows in an undercover capacity and purchased firearms from Breier. Breier realized a gross profit on these transactions, but claims he suffered a net loss after the cost of renting the tables is subtracted.

In February, 1986, Breier was indicted by a grand jury on five counts of violating 18 U.S.C. § 922(a)(1), unlicensed dealing in firearms. A jury trial commenced on April 1, 1986, and Breier was convicted by the jury on all five counts. On May 11, Breier was sentenced to a term of forty-five days in the custody of the Attorney

General, five years probation, and a $5000.00 fine. Only a few days later, May 19, 1986, the President signed the Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 449 (1986). The 1986 Act became effective 180 days after enactment, *i.e.*, November 15, 1986. *See* Pub. L. No. 99-308, § 110(a), 100 Stat. at 460. As will be seen, the 1986 Act was considered by Breier to be more favorable to his position than was the law under which he was tried and convicted. On May 20, Breier timely filed a notice of appeal.

II.

DISCUSSION

Section 922(a)(1) of 18 U.S.C. provides, in pertinent part, that it is unlawful "for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms." 18 U.S.C. § 921(a)(11) provides, in relevant part, that a "dealer" is "any person engaged in the business of selling firearms . . . at wholesale or retail." The law at the time the defendant was convicted did not further define the term "dealer" by setting forth a definition of the term "engaged in the business." Courts have fashioned their own definitions of the term. For example, we have previously stated "that where transactions of sale, purchase or exchange of firearms are regularly entered into in expectation of profit, the conduct amounts to engaging in business." *United States v. Van Buren*, 593 F.2d 125, 126 (9th Cir.1979) (per curiam). In *United States v. Wilmoth*, 636 F.2d 123 (5th Cir. Unit A 1981), the Fifth Circuit stated that to prove the status of the accused as one engaged in the business of dealing in firearms, "the Government must show a greater degree of activity than the occasional sale of a hobbyist." *Id.* at 125. "It is enough to prove that the accused has guns on hand or is ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers."

Id.; *accord United States v. Carter*, 801 F.2d 78, 82 (2d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 657, 93 L.Ed.2d 712 (1986); *United States v. Burgos*, 720 F.2d 1520, 1527 n. 8 (11th Cir.1983). Both parties agree that the jury instruction in this case was in accordance with interpretations of § 922(a)(1) given by this and other circuits.[1]

Under the revised law that went into effect on November 15, 1986, the definition of the offense, 18 U.S.C. § 922(a)(1), and the definition of a firearms "dealer," 18 U.S.C. § 921(a)(11)(A), remain the same. However, section 101 of the 1986 Act provides further definition

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[1] The court instructed the jury as follows:

> The term "dealer", for purposes of this case, is defined as "any person engaged in the business of selling firearms or ammunition at wholesale or retail . . ."
>
> A business is an activity which occupies a person's time, attention and labor, with some regularity or continuity, for the purpose of livelihood or profit. One may be engaged in a business even though the business does not require all, or even a substantial portion, of his working time. Nor is it necessary to show that a profit was actually made.
>
> A person engages in the business of dealing in firearms if he has guns on hand or is ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as he might from time to time accept as customers. Such business need not be the defendant's primary business, nor must he make a certain amount of profit from the business. The statute is aimed at those who hold themselves out as a source of firearms, or those who engage in regular and repeated buyings and/or sellings of firearms, as opposed to an isolated or occasional transaction.
>
> The distinction between collecting as a hobby and dealing as a business is ont unknown to the law and where transactions of sale, purchase or exchange of firearms are regularly entered into in expectation of profit, the conduct amounts to engaging in business.

Reporter's Transcript at 3-92 to 3-93.

with respect to the term "engaged in the business" as follows:

> (21) The term 'engaged in the business' means—
>
> . . .
>
> (C) As applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;
>
> (22) The term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

Pub.L. No. 99-308, § 101, 100 Stat. at 450.

Although subsections 921(a)(21) and 921(a)(22) are not included among the list of retroactive sections found in section 110(b) of the 1986 Act, Breier argues that we should apply these sections retroactively and remand for a new trial. To prevail Breier also faces the formidable obstacle of the federal savings clause, 1 U.S.C. § 109, which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Congress enacted the forerunner of § 109 "to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Warden v. Marrero*, 417 U.S. 653, 660, 94 S.Ct. 2532, 2536, 41 L.Ed.2d 383 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 607, 93 S.Ct. 1151, 1153, 35 L.Ed.2d 528 (1973)); *see Hamm v. City of Rock Hill*, 379 U.S. 306, 314, 85 S.Ct. 384, 390, 13 L.Ed.2d 300 (1964).[2]

Although the savings clause on its face applies to the "repeal of any statute," it has been held to apply to statutory amendments as well. *E.g., United States v. Mechem*, 509 F.2d 1193, 1194 n. 3 (10th Cir. 1975) (per curiam); *see White v. Warden*, 566 F.2d 57, 59 (9th Cir. 1977). In *Marrero*, the Court held that the prohibition

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[2] Anomalous results developed at common law when a criminal statute was repealed and reenacted with different penalties. A criminal defendant who was fortunate enough to have his offense made the subject of stiffer penalties was able to skate completely free. At common law the repealed statute could not be charged, nor could the replacement statute in view of *ex post facto* prohibitions. *See United States v. Tynen*, 78 U.S. (11 Wall.) 88, 20 L.Ed. 153 (1871). The defendant's prosecution was said to "technically" abate. In *Hamm*, 379 U.S. at 314, 85 S.Ct. at 390, the Supreme Court concluded that Congress adopted the original federal saving statute in 1871 "to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen*." A nontechnical abatement of prosecution occurred at common law when a statute was changed so that the conduct in question was no longer a crime. The Supreme Court has applied § 109 to avoid nontechnical as well as technical abatements. *See, e.g., Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 553-55, 74 S.Ct. 745, 755-56, 98 L.Ed. 933 (1954); *Hertz v. Woodman*, 218 U.S. 205, 214-18, 30 S.Ct. 621, 623-24, 54 L.Ed. 1001 (1910); *United States v. Reisinger*, 128 U.S. 398, 401-02, 9 S.Ct. 99, 101-02, 32 L.Ed. 480 (1888). The Court has more recently indicated that focus on whether a prosecution would "technically abate" under the common law rule is not the proper analysis. *Marrero*, 417 U.S. at 660 n.11, 94 S.Ct. at 2537 n.11.

on parole eligibility under 26 U.S.C. § 7237(d), which was repealed while the defendant was serving his sentence, was preserved by the federal savings clause. 417 U.S. at 659-64, 94 S.Ct. at 2536-39. The Court stated that the determinative question is whether the repealed prohibition is a "penalty, forfeiture, or liability" saved from extinguishment by 1 U.S.C. § 109. *Id.* at 660, 94 S.Ct. at 2536. *Marrero* was the last opportunity for the Court to consider § 109.

Lower courts have not adopted a uniform approach to § 109.[3] There have been only five post-*Marrero* cases from this circuit discussing § 109, and none provides much assistance to deciding this case. *See United States v. Edmonson*, 792 F.2d 1492, 1498 n. 5 (9th Cir. 1986) (finding it unnecessary to reach the § 109 issue), *cert. denied*, —— U.S. ——, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987); *Mendoza v. Wight Vineyard Management*, 783 F.2d 941, 945 (9th Cir.1986) (per curiam) (finding a waiver of the § 109 argument); *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir.1985) (per curiam) (declining to apply § 109 to a statute of limitations in a civil context); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1078 n. 2 (9th Cir.1982) (applying

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[3] A recent district court opinion examined the various judicial approaches in recent years to § 109, and broke them down into three categories:

> "(1) those which have embraced a strict, technical, and literal approach in applying § 109 with undeviating harshness; (2) those which have adopted a considerably more flexible approach based on the totality of the circumstances surrounding a given piece of legislation; and (3) those which have not really taken a stance on the role of § 109 in modern-day statutory construction, but which at the same time, have exhibited remarkable creativity in avoiding that precise question."

United States v. Jimicum, 608 F.Supp. 1530, 1539 (E.D.Wash. 1985) (footnotes omitted), *rev'd sub. nom. United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987).

§ 109 to find no abatement), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983), *White*, 566 F.2d at 61-62 (applying § 109 in conjunction with four other factors to find nonretroactivity).

Guided by the analysis used by the Supreme Court in *Marrero*, we find that 1 U.S.C. § 109 bars retroactive application of the pertinent portion of section 101 of the 1986 Act. That portion of section 101 repealed a "liability" to which Breier previously was subject. Congress, as already pointed out, included a provision in the 1986 Act specifying which sections were to have retroactive effect and the sections in question here were not included in that list. This precludes the finding of an implied congressional intent of retroactivity, as the court found in *Mechem*, 509 F.2d at 1195-96. This returns us to § 109, which directs that the guilt of Breier be measured by 18 U.S.C. § 922(a)(1), with its accompanying judicial construction, as it stood prior to the effective date of the 1986 Act.

The legislative history of the 1986 Act shows that Congress was well aware of the judicial interpretations of the term "engaged in the business."[4] It enacted new subsections 921(a)(21) and 921(a)(22) in order to limit the conduct deemed to be criminal. This, to repeat, repealed a "liability." We must presume that Congress was familiar with the federal savings clause, and had it intended to alter the effect given to conduct before the amendment it would have so indicated.

Breier erroneously relies on *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir.1977). In *Blue Sea Line*, the Fifth Circuit found that the repeal of a criminal statute and replacement of it with penal civil sanctions was "procedural" in nature and thus not affected by § 109. *Id.* at 448-50. The court found that in enacting

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[4] *See* 131 Cong.Rec. S9127 (daily ed. July 9, 1985); 131 Cong.Rec. S8689 (daily ed. June 24, 1985) (statement of Sen. Hatch).

the amendments in question, "Congress was clearly not engaged in ameliorating criminal punishment. . . . On the contrary, its concern was to tighten enforcement of the existing monetary sanctions." *Id.* at 450. Not so in this case. Ameliorating substantive criminal liability is exactly what Congress intended by enacting the portion of the 1986 Act with which we are concerned. Thus, *Blue Sea Line* and other cases making the procedure/penalty distinction are inapposite.

We take comfort in the recent Second Circuit opinion in *United States v. Carter*, 801 F.2d 78 (2d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 657, 93 L.Ed.2d 712 (1986). There the court was presented with the precise question at issue here, whether new subsections 921(a)(21) and 921(a)(22) should be applied retrospectively. The court concluded they should not be:

> [E]ven if we believed these amendments to § 921 so narrowed the scope of the activities covered by § 922(a)(1) that defendants' conduct would be excluded, we would not apply them retroactively, since such retrospectivity is plainly contrary to Congress's intent. The [1986] Act provides that the amendments to § 921 do not become effective until 180 days after enactment, *i.e.*, November 15, 1986.

Id. at 83.

The judgment of conviction is affirmed.[5]

AFFIRMED.

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[5] *United States v. Adair*, 649 F.Supp. 61 (S.D. Tex. 1986), is not inconsistent with our opinion. The *Adair* court found that the savings clause did not preserve former 18 U.S.C.App. § 1202(a), repealed by the 1986 Act, which along with 18 U.S.C. § 922 prohibited the possession of a fireman by a convicted felon. *Id.* at 62. That offense is now proscribed solely by § 922, which under the 1986 Act contains a different definition of "conviction" than did § 1202(a). The court held that the prosecution could not proceed under the former statute because such a proceeding would frustrate con-

NOONAN, Circuit Judge, concurring:

I concur because of the express intent of Congress to make the amendments to the Firearms Owners' Protection Act effective only 180 days after the enactment of the law. 100 Stat. 461 (1986). I do not believe that the definition is "a liability" in the sense of the Federal Savings Clause, 1 U.S.C. § 109. As the Supreme Court has said, the words "penalty" "forfeiture" and "liability" are "synonymous with the word 'punishment' in connection with crimes of the highest grade." *U.S. Reisinger*, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed.2d 480 (1888), quoted *Warden v. Marrero*, 417 U.S. 653, 661, 94 S.Ct. 2532, 2537, 41 L.Ed.2d 383 (1974). It is a violent stretch of language to treat a definition as a punishment.

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gressional intent. Although not directly faced with the question, the *Adair* court assumed, and apparently the government conceded, that the redefinition of "conviction" would apply in prosecutions under § 922 for offenses committed before passage of the 1986 Act. *Id. Adair* is distinguishable because the redefinition of "conviction" does not alter the effect given to conduct before the amendment, but rather merely alters the class of persons for whom the proscribed conduct is prohibited.

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Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-986

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER, PETITIONER

v.

~~TO BE~~ PRINTED UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether convictions under 18 U.S.C. (1982 ed.) 922 for unlicensed dealing in firearms should abate in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-986

DONALD DOUGLAS BREIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-15a) is reported at 813 F.2d 212.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1987. A petition for rehearing was denied on September 16, 1987. On November 9, 1987, Justice O'Connor granted an extension of time, until December 15, 1987, for filing a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on five counts of unlicensed dealing in firearms, in

violation of 18 U.S.C. (1982 ed.) 922(a)(1). The district court sentenced petitioner to 45 days' imprisonment, five years' probation, and a $5,000 fine. The court of appeals affirmed.

1. Petitioner is a gun collector. During the summer of 1984, he began renting tables at gun shows, where he bought, sold, and traded firearms. In April 1985, he was contacted by an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF). The agent told petitioner that ATF had reason to believe he was trading in firearms on a regular basis and warned him that a federal firearms license is required for persons who regularly traffic in firearms. Petitioner assured the agent that he was only a collector and that he was not regularly trading in firearms. Over the next year and a half, however, ATF agents attended several gun shows in an undercover capacity and purchased firearms from petitioner; petitioner realized a gross profit on those sales, although he claimed to have suffered a net loss, because of associated expenses, on his overall dealings. In February 1986, a grand jury indicted petitioner on five counts of violating the Gun Control Act of 1968, 18 U.S.C. (1982 ed.) 922(a)(1), which made it unlawful "for any person, except a * * * licensed dealer, to engage in the business of * * * dealing in firearms." Pet. App. 7a.

A jury trial commenced on April 1, 1986 (Pet. App. 7a). At the close of the evidence, the case was submitted to the jury with instructions that the term "dealer" in 18 U.S.C. (1982 ed.) 922(a)(1) meant " 'any person engaged in the business of selling firearms * * * at wholesale or retail.' " Pet. App. 9a n.1 (quoting 18 U.S.C. (1982 ed.) 921(a)(11)(A)), and that the phrase "engage[d] in the business of dealing in firearms" in 18 U.S.C. (1982 ed.) 922(a)(1) meant that the defendant "h[e]ld [himself] out as a source of firearms, or * * * engage[d] in regular and

repeated buyings and/or sellings of firearms, as opposed to an isolated or occasional transaction," even if the defendant did not sell firearms as his primary business or actually realize a profit from his sales (Pet. App. 9a n.1).[1] The jury convicted petitioner on all five counts and, on May 11, 1986, the court imposed sentence (Pet. App. 7a-8a).

2. On May 19, 1986, a few days after petitioner was sentenced, Congress enacted the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449. The FOPA did not change the offense set forth in 18 U.S.C. (1982 ed.) 922(a)(1) or the definition of "dealer" set forth in 18 U.S.C. (1982 ed.) 921(a)(11)(A). Rather, it added a new subsection 21(C) to 18 U.S.C. 921 and thereby redefined the phrase "engaged in the business" to refer to a person who "deal[s] in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms" (§ 101(6), 100 Stat. 450).[2] The FOPA also added a new subsection 22 to 18 U.S.C. (1982 ed.) 921, which

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[1] That instruction was consistent with the construction of Section 922 uniformly embraced by the courts of appeals. See, *e.g.*, *United States* v. *Carter*, 801 F.2d 78, 82 (2d Cir.), cert. denied, 479 U.S. 1012 (1986); *United States* v. *Burgos*, 720 F.2d 1520, 1527 n.8 (11th Cir. 1983); *United States* v. *Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981). See also *United States* v. *Powell*, 513 F.2d 1249, 1250 (8th Cir.), cert. denied, 423 U.S. 853 (1975).

[2] Section 921(a)(21)(C) (18 U.S.C. (Supp. IV)) provides that the term "engaged in the business" means:

> [A]s applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

defined the phrase "with the principal objective of livelihood and profit" to mean that the intent was "predominantly one of obtaining livelihood and pecuniary gain" (§ 101(6), 100 Stat. 450).[3] And Section 110 of the statute provided that, with a few specific exceptions, the provisions of the FOPA, including new subsections 21(C) and 22, would take effect 180 days after their enactment—*i.e.*, on November 15, 1986. 100 Stat. 460-461.[4]

3. On appeal, petitioner argued that recently enacted subsections 21(C) and 22 should be applied retroactively to his case and, accordingly, that his convictions should be reversed (Pet. App. 7a). The court of appeals rejected that argument and affirmed petitioner's convictions (*id.* at 6a-15a).

The court began by noting (Pet. App. 10a) that subsections 21(C) and 22 are not included among the list of provisions that the FOPA expressly made retroactive. In spite

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[3] Section 921(a)(22) (18 U.S.C. (Supp. IV)) provides, in pertinent part:

> The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. * * *

[4] Specifically, Section 110 provides, in pertinent part:

> (a) IN GENERAL.—The amendments made by this Act shall become effective one hundred and eighty days after the date of the enactment of this Act. * * *
>
> (b) PENDING ACTIONS, PETITIONS, AND APPELLATE PROCEEDINGS.—The amendments made by sections 103(6)(B), 105, and 107 of this Act [which affect 18 U.S.C. 923(f), 925, and 926A] shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act.
>
> (c) MACHINEGUN PROHIBITION.—Section 102(9) shall take effect on the date of the enactment of this Act.

BEST AVAILA

of that omission, petitioner argued that those provisions should be given retroactive application so that they would apply to conduct that was governed by the prior version of Section 921 at the time the conduct occurred. In making that argument, the court of appeals observed, petitioner "faces the formidable obstacle of the federal savings clause, 1 U.S.C. § 109" (Pet. App. 10a). That statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." The court determined that Congress enacted the saving clause in order " 'to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them" ' " (Pet. App. 11a (citations omitted)). And it found that, "[a]lthough the savings clause on its face applies to the 'repeal of any statute,' it has been held to apply to statutory amendments as well" (*ibid.*). Accordingly, the court concluded that "the determinative question is whether the repealed prohibition is a 'penalty, forfeiture, or liability' saved from extinguishment by 1 U.S.C. § 109" (Pet. App. 12a).

The court determined that new subsections 21(C) and 22 of the FOPA repealed a "liability" to which petitioner previously was subject (Pet. App. 13a). The court then noted that "Congress * * * included a provision in the 1986 Act specifying which sections were to have retroactive effect and the sections in question here were not included in that list." The omission of the amendments to Section 922 from the list of provisions that were meant to

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have retroactive effect, the court held, "precludes the finding of an implied congressional intent of retroactivity" and "returns us to [section] 109, which directs that the guilt of [petitioner] be measured by 18 U.S.C. § 922(a)(1), with its accompanying judicial construction, as it stood prior to the effective date of the 1986 Act" (Pet. App. 13a). The court added that "[t]he legislative history of the 1986 Act shows that Congress was well aware of the judicial interpretations of the term 'engaged in the business' " and that it enacted new subsections (21)(C) and (22) "in order to limit the conduct deemed to be criminal" (Pet. App. 13a (footnote omitted)). Congress, the court concluded, must be presumed to be familiar with the general saving clause, and if Congress had intended to have the new subsections affect conduct occurring prior to the effective date of the amendments, it would have so indicated (*ibid.*).

4. Judge Noonan initially concurred in the court of appeals' judgment; while he did not believe that the FOPA amendments addressed a "liability" within the meaning of 1 U.S.C. 109, he did find it to be "the express intent of Congress to make the amendments to [FOPA] * * * effective only 180 days after the enactment of the law" (Pet. App. 15a). On petition for rehearing, however, Judge Noonan reassessed that conclusion and determined that, notwithstanding the explicit provision delaying their effective date, the FOPA amendments should be applied retroactively to petitioner's case. The retroactive application of those provisions of the FOPA was necessary, Judge Noonan concluded, in order to promote Congress's objective of correcting prior ATF enforcement policies with which Congress disagreed (*id.* at 4a-5a).

ARGUMENT

1. The decision of the court of appeals is correct. The general saving clause states that the repeal of a statute does not "release or extinguish any * * * liability" under that statute "unless the repealing Act shall so expressly provide" (1 U.S.C. 109). The amendments to Section 921 are subject to the general saving clause because they altered the definition of the activity made criminal by 18 U.S.C. (1982 ed.) 922 and thereby affected the "liability" of persons subject to the statute. See generally *Warden* v. *Marrero*, 417 U.S. 653, 661-664 (1974); *Pipefitters* v. *United States*, 407 U.S. 385, 434-435 (1972). Moreover, as the court of appeals noted (Pet. App. 10a), the "repealing Act" does not "expressly provide" that the new provisions relating to firearms dealers should be given retroactive effect. On the contrary, Section 110 of the FOPA expressly provides that the FOPA amendments would take effect only 180 days after their enactment. While certain provisions of the FOPA were given retroactive application "to any action, petition, or appellate proceeding pending on the date of the enactment of this Act," the amendments to Section 921 were not included among them. This omission is strong if not conclusive evidence that Congress did not intend the amendments to Section 921 to apply retroactively and thereby to override the effect of the general saving provision. See generally *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987), slip op. 9.

2. Nor is there any dispute among the courts of appeals concerning whether the amendments to Section 921 should apply retroactively. The only other court of appeals to address the issue has also held that the "firearms dealer" provisions of the FOPA are not to be given retroactive effect. *United States* v. *Carter*, 801 F.2d 78, 83

(2d Cir.) ("retrospectivity is plainly contrary to Congress's intent"), cert. denied, 479 U.S. 1012 (1986); see also *United States* v. *Jackson*, 824 F.2d 21, 22-23 & n.2 (D.C. Cir. 1987); *United States* v. *Pennon*, 816 F.2d 527, 529 (10th Cir. 1987). And, contrary to petitioner's suggestion (Pet. 5-8), the decision in this case does not conflict with the decision of the Eleventh Circuit in *United States* v. *Orellanes*, 809 F.2d 1526 (1987).

In *Orellanes*, the defendant was charged with receiving firearms and ammunition, in violation of 18 U.S.C. (1982 ed.) 922(h)(1). The charges were based on Orellanes's purchases of firearms and ammunition between 1982 and 1985, after he had pleaded guilty to two felonies in Florida state court. The defendant argued (1) that his convictions abated on the date the FOPA became effective; (2) that because the Florida court had entered an order withholding adjudication after his guilty plea, he was not a "convicted" felon within the meaning of 18 U.S.C. (1982 ed.) 922(h)(1); and (3) that this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1984), holding that a guilty plea is a conviction for purposes of Section 922(h)(1), even if it is not accompanied by an adjudication of guilt, should not be applied retroactively to his case.

The court of appeals rejected each of those arguments and affirmed Orellanes's conviction. With respect to the abatement argument, the court held that the general saving clause, 1 U.S.C. 109, prevented the prosecution from abating at the time the FOPA became effective, particularly since the FOPA "contains no provision precluding the retention of accruing penalties" (809 F.2d at 1529). With respect to the meaning of the term "convicted," the court held that, even under Florida law, a plea of guilty constitutes a conviction, even in the absence of an adjudication by the court (801 F.2d at 1528). And, finally, with

respect to the challenge to the application of *Dickerson*, the court held that *Dickerson* was fully applicable to petitioner's conduct (809 F.2d at 1528).

Petitioner does not claim that the decision below conflicts with any of those three holdings by the court in *Orellanes*. Rather, he relies on the court's reference to the FOPA in the course of its discussion of Florida law—specifically, its notation that Section 101(5) of the FOPA statutorily overruled the decision in *Dickerson* and requires a court to look to state law in determining whether a guilty plea constitutes a conviction (809 F.2d at 1528). But because Orellanes was considered "convicted" under both state and federal law, the Eleventh Circuit did not have to decide whether Section 101(5) of the FOPA would have applied retroactively to relieve the defendant of liability for the firearms offenses he committed prior to the effective date of the Act. Thus, the decision in this case does not conflict with the decision in *Orellanes*; at most, the decision in this case is contrary to an unarticulated premise of a portion of the opinion in *Orellanes*, a premise that was unnecessary to the court's judgment.[5]

Moreover, the internal inconsistencies in the Eleventh Circuit's opinion in *Orellanes* make it unclear whether that court would have reached a different result from the court below on the facts of this case. The court in *Orellanes* suggested both that the FOPA provided the governing definition of the term "convicted" and that the *Dickerson* case was applicable to Orellanes's conduct; but the term "convicted" cannot draw its meaning from state and federal law at the same time. Similarly, the *Orellanes* court sug-

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[5] We note, in addition, that *Orellanes* dealt with a different section of the Gun Control Act. *Orellanes* involved the "prior conviction" provision, 18 U.S.C. (1982 ed.) 922(h)(1), while this case involves the "firearms dealer" provision, 18 U.S.C. (1982 ed.) 922(a).

gested that both Section 101(5) of the FOPA and the general saving clause, 1 U.S.C. 109, controlled the case; but a statute cannot be both retroactive and nonretroactive at the same time.[6] These internal inconsistencies indicate that the Eleventh Circuit's discussion of Section 101(5) of the FOPA cannot properly be used as the basis for an asserted conflict among the circuits.

Finally, even if some of the language in *Orellanes* can be read as implying that Section 101(5) of the FOPA is to be applied retroactively, review by this Court is unwarranted because of the diminishing importance of the issue. The question whether the FOPA amendments should be given retroactive application has arisen in only a small number of cases under the Gun Control Act and, in light of the passage of time since the FOPA amendments were enacted in 1986, it is not likely to arise in many more. As we have shown, the Ninth Circuit's application of the general saving clause was clearly correct, and only the rather cryptic language from a portion of the *Orellanes* case stands on the other side. Because that language has not caused confusion among other courts—and did not even result in an incorrect outcome in the *Orellanes* case itself—this Court's intervention is not warranted.

3. Petitioner next contends (Pet. 8-17) that this Court's decisions do not establish a clear "analytical proc-

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[6] The confusion in the opinion of the *Orellanes* court may have resulted from that court's focus on the term "penalty" in the general saving clause. While recognizing that the general saving clause preserves "any penalty" established in a prior statute, the court may have overlooked that the saving clause also preserves any "liability" established in a prior statute, absent an express provision to the contrary in the repealing or amending statute. If the general saving clause is applicable to the FOPA amendments, as the *Orellanes* court held it was, the result is the preservation of a liability—in this case, the preservation of petitioner's liability for trading in firearms without a license, as that term was defined prior to the FOPA amendments.

ess" for the federal courts to follow in applying 1 U.S.C. 109 and that the lower courts need guidance concerning the effect that the general saving provision has on an amending statute such as the FOPA. This contention is without merit.

The principles governing the abatement of criminal prosecutions are, in fact, relatively clear. The common law rule provided that a prosecution under a statute that is repealed or amended while the case is pending on direct review must abate in the "absence of a demonstration of contrary congressional intent or a general saving statute." *Pipefitters* v. *United States*, 407 U.S. 385, 432 (1972). See also *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *United States* v. *Reisinger*, 128 U.S. 398, 401 (1888). The general saving clause is such a statute; it was enacted to abolish the common law presumption that the repeal of a criminal statute resulted in the abatement of all prosecutions that had not yet become final. *Warden* v. *Marrero*, 417 U.S. at 660-661 & n.11; *Pipefitters* v. *United States*, 407 U.S. at 433. The general saving clause does not create an inflexible rule that no repealing or amending statute can be given retroactive effect; instead, it creates a presumption in favor of nonretroactivity, which can be overridden if Congress has indicated a desire to make a particular statute—or certain provisions of a statute—retroactive. See *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Great Northern Ry.* v. *United States*, 208 U.S. 452, 464-466 (1908).

Petitioner suggests that *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964), is inconsistent with this analysis. In *Hamm*, the Court held that state prosecutions of persons who had participated in "sit-in" demonstrations at retail store lunch counters had to abate because of the subsequent enactment of the Civil Rights Act of 1964. In the course of its discussion, the Court stated (379 U.S. at 314) that, if the "sit-in" convictions had been federal convic-

tions, they would not have been saved from abatement by the general saving clause. The Court held that the effect of the Civil Rights Act went far beyond merely repealing prior contrary laws—instead, the Act "substitutes a right for a crime" (*ibid.*). That "drastic * * * change" in the law, the Court stated, "is well beyond the narrow language of amendment and repeal." Therefore, the Court concluded, the effect of the Civil Rights Act was to go beyond the "mere technical abatement" that the saving clause was meant to avoid (*ibid.*).

Unlike the Civil Rights Act of 1964, the FOPA amendments were not intended to "substitute[] a right for a crime"; they merely removed certain categories of conduct from the reach of the criminal sanction—the same effect that any repeal of a criminal statute would have. The Court's analysis in *Hamm* is therefore inapplicable here. Moreover, the Court in *Hamm* was applying a statute that did not contain a powerful guide to statutory construction of the kind that was available to the court of appeals in this case: Section 110 of the FOPA, which indicates that certain provisions of the FOPA would be applied retroactively to cases on appeal at the time of enactment, but which did not include the provisions at issue in this case.

Later decisions by this Court have made clear that the *Hamm* case was not intended to mark a departure from the Court's traditional construction of the general saving clause and its relationship to statutes that repeal or amend criminal sanctions. In *Pipefitters* v. *United States, supra,* for example, the Court addressed the question whether a prosecution for illegal campaign contributions under 18 U.S.C. (1970 ed.) 610 was affected when the statute was amended by Section 205 of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 10. The Court found no evidence that Congress intended the 1971 statute

to preserve prosecutions under the former version of Section 610; nonetheless, the Court held that the general saving clause barred the abatement of any prosecutions under the prior version of Section 610. 407 U.S. at 432-433. The Court distinguished the *Hamm* case by pointing out that, although Section 205 of the Federal Election Campaign Act of 1971 may have "ma[d]e lawful what was previously unlawful," it did not "[substitute] a right for a crime." 407 U.S. at 434. Therefore, the Court held that, even if the former Section 610 was implicitly repealed by the 1971 statute, the defendants remained punishable under the prior version of Section 610.

Two years later, in *Warden* v. *Marrero, supra*, the Court again applied the general saving clause to preserve a penalty that had been repealed by a statute that was enacted after the defendant's conviction. In that case, the Court held that the general saving clause preserved the no-parole provision of the pre-1970 narcotics laws, 26 U.S.C. (1964 ed.) 7237(d), as applied to the defendant, even though that provision was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Because there was no indication in the latter statute that the repeal of the no-parole provision was meant to be applied retroactively, and because the Court concluded that the no-parole provision of the former statute was a "penalty" within the meaning of 1 U.S.C. 109, the Court held that the defendant was not entitled to relief based on the later statute.[7]

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[7] Although the decision in *Warden* v. *Marrero, supra*, drew a dissent, the analysis adopted by the dissenters supports the position taken by the Ninth Circuit in this case. The dissenters accepted the basic proposition that "apart from exceptional circumstances [citing *Hamm* v. *Rock Hill, supra*], one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law

The decisions in *Pipefitters* and *Warden* v. *Marrero* control this case. Like the amending statute at issue in *Pipefitters*, the FOPA amendments merely "ma[d]e lawful what was previously unlawful"; they did not substitute "a right for a crime." 407 U.S. at 434. Moreover, as in both *Pipefitters* and *Warden* v. *Marrero*, there is nothing in the FOPA to indicate that Congress intended the amendments to Section 921 to apply retroactively; on the contrary, as we have noted, there is a strong textual basis for the inference that those amendments were not intended to have retroactive application. Petitioner committed an act which, at the time, was clearly criminal. Indeed, even though he had been warned by an ATF agent that his conduct was criminal, he persisted in it. He should not receive a windfall from Congress's subsequent decision to decriminalize certain kinds of firearms transactions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988

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happens to be repealed." *Warden* v. *Marrero*, 417 U.S. at 665 (Blackmun, J., dissenting).

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BRIEF AMICI CURIAE OF UNITED STATES SENATOR JAMES A. McCLURE AND UNITED STATES REPRESENTATIVES HAROLD VOLKMER, LARRY CRAIG, AND RON MARLENEE

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents the question of the applicability of an amendment to 18 U.S.C. 921(a) made by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), to a case pending in the federal courts after the effective date of the FOPA but which arose from acts committed prior to that date. More broadly, this case presents to this Court an opportunity

to determine the degree to which congressional intent in enacting amendments to penal statutes nullifies the effect of the federal general saving provision, 1 U.S.C. 109.

United States Senator James A. McClure is the senior senator from Idaho. In 1979, he introduced S. 1862 (96th Cong., 1st Sess.), the initial version of the bill which ultimately became the FOPA. As S. 1862 was not acted on by the 96th Congress, Senator McClure subsequently introduced revised versions of the bill in the 97th (S. 1030), 98th (S. 914), and 99th (S. 49) Congresses, culminating in the enactment of S. 49 as the FOPA by the 99th Congress. As the primary Senate sponsor of the FOPA, Senator McClure is acutely concerned with the interpretation, application, and implementation of the FOPA by the judicial branch. Moreover, as an attorney well-versed in statutory construction, Senator McClure believes that this Court will benefit from his analysis of the FOPA. Finally, as a member of Congress concerned with the enactment of penal statutes generally, Senator McClure has a genuine interest in seeing this Court settle the effect of the general saving provision.

United States Representative Harold Volkmer was the chief sponsor of the series of bills which ultimately became the FOPA. The initial version of the bills was H.R. 5225 (96th Cong., 1st Sess.), introduced by Representative Volkmer in 1979; this was followed, in 1981, by H.R. 3300 (97th Cong., 1st Sess.), in 1983, by H.R. 2420 (98th Cong., 1st Sess.), and finally, in 1985, by H.R. 945 (99th Cong., 1st Sess.). As the chief sponsor of the FOPA, Representative Volkmer has a particular interest in the construction and application of its provisions. And, like Senator McClure, Representative Volkmer, as an attorney, believes that this Court can benefit from his analysis of the FOPA and the general saving provision.

United States Representatives Larry Craig and Ron Marlenee were co-sponsors of H.R. 3300 (97th Cong., 1st Sess.), the companion bill to S. 1030, the second version of what ultimately became the FOPA; they were also co-sponsors of revised versions of H.R. 3300 introduced in the 98th (H.R. 2420) and 99th (H.R. 945) Congresses. As leading proponents in the House of Representatives of the reforms made by the FOPA, Representatives Craig and Marlenee have a special interest in the judicial branch's interpretation, implementation, and application of the FOPA. Moreover, Representatives Craig and Marlenee, as members of Congress, have a significant interest in having this Court clarify the status of the general saving provision.

Amici curiae fully recognize that after-the-fact "legislative history" should not be given weight by the federal courts; thus, this brief is not, and is not intended to be, a presentation of after-the-fact legislative history, but rather a legal analysis of the FOPA intended to benefit the Court's analysis of the need to grant Breier's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The argument of *amici curiae* may be very briefly summarized as follows: that the congressional findings in § 1(b) of the FOPA, in conjunction with the language of the effective date provisions of the FOPA, as well as the evidence of intent found in the Judiciary Committee reports, indicate an intent on the part of Congress that the amendments made by the FOPA should apply to all cases pending on the FOPA's effective date.

ARGUMENT

In its opinion in *United States v. Breier*, 813 F.2d 212 (9th Cir. 1987), *reh'g den.* —— F.2d ——, the Ninth Circuit dealt with the applicability of the FOPA to cases brought pursuant to 18 U.S.C. 921(a) which were pending on November 15, 1986, the effective date of the FOPA, and held that amendments made by the FOPA did not apply to cases which had arisen prior to the FOPA's effective date but were pending after that date. In so doing, the Ninth Circuit seriously misconstrued the intent of Congress.

The intent of Congress in enacting the FOPA was plainly set forth in § 1(b), in which Congress found that additional legislation was required "to *correct* existing firearms statutes and enforcement policies" and "to reaffirm the intent of the Congress, as expressed in Section 101 of the Gun Control Act of 1968. . . ." (emphasis added).[1] This finding reflected Congress' concern, derived from several Senate Judiciary and Appropriation Committee hearings[2] that the Gun Control Act of 1968 had become a tool for abusive enforcement practices by

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[1] The intent of Congress as expressed in § 101 of the Gun Control Act of 1968, which the FOPA sought to reaffirm and thus revitalize, was that "it was not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

[2] See, Gun Control and Constitutional Rights: Hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on Constitutional Oversight of a Regulatory Agency—the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury—on the Enforcement of the Gun Control Act of 1968, 96th Cong., 2d Sess. (1980); Oversight Hearings on the Bureau of Alcohol, Tobacco and Firearms, Fiscal Year 1980, before the Senate Committee on Appropriations, 96th Cong., 1st Sess. (1979).

the Bureau of Alcohol, Tobacco, and Firearms and that a legislative remedy was called for. At those hearings "[m]ost of the public witnesses who testified repeated the *urgent* need for changes in current law to prevent the recurrence of abuses documented in detail . . . ." (emphasis added) Report of the Senate Committee on the Judiciary, Report 98-583, 98th Cong. 2d Sess. (1984), at 3.[3]

Yet, if the Ninth Circuit's view of the applicability of the FOPA is correct, congressional intent will plainly be thwarted and the very purpose of the FOPA, as expressed by § 1(b) and the Judiciary Committee, would be largely negated. This is because the FOPA will not have full effect until November 15, 1991 because, until that date, prosecutions under the Gun Control Act of 1968 as it existed prior to the enactment of the FOPA, could continue to be brought given that the statute of limitations is five years. See 18 U.S.C. 3282.

The effective date provision of the FOPA (§ 110) also compels the conclusion that Congress intended the FOPA to apply to all cases pending on November 15, 1986. In its opinion, the Ninth Circuit refers to § 110(b) as a provision "specifying which sections were to have retroactive effect", 813 F.2d at 215, and concludes that failure to include § 101 (the amendment to 18 U.S.C. 921(a) at issue in *Breier*) in the list of sections in § 110(b) "precludes the finding of an implied congressional intent of retroactivity" to § 101. 813 F.2d at 215. This erroneously interprets § 101(b). In fact, all that § 110 does is to establish an effective date for the three sections listed therein different, and earlier than, the effective date of the remainder of the law; it does not establish

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[3] This Report accompanied S.914 (introduced in the 98th Congress), the immediate predecessor of S.49. As S.914 was virtually identical to S.49 (the bill which became the FOPA), committee consideration of S.49 in the 99th Congress was unnecessary, and thus there was no report on S.49.

that the three listed sections are "retroactive" and that the remainder of the provisions of the FOPA are not. Indeed, the reason Congress expressly stated that the three listed sections were applicable to proceedings pending on the date of enactment of the FOPA was certainly its understanding, in view of § 1(b), that, on the effective date, all the amendments made by the FOPA would apply to all pending proceedings. Congress simply wished the three sections listed in § 110(b) to apply to pending proceedings earlier than the remainder of the provisions of the FOPA.

Finally, while not stated in so many words in the FOPA, the provisions of the FOPA should come within the exception to the rule established by the general saving provision, 1 U.S.C. 109. That exception states that the rule of § 109 does *not* apply to a repealing act which "expressly provide[s]" that the repeal of a statute shall "have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . . ." Congress' statement in § 1(b) regarding the need for additional legislation "expressly provide[s]" that the FOPA has "the effect to release or extinguish any penalty, forfeiture, or liability incurred under" the Gun Control Act of 1968. § 109 does not state that a repealing act must expressly "state" that it shall "have the effect to release or extinguish any penalty, forfeiture, or liability incurred," but rather states only that the repealing act must expressly so "provide," a broader term allowing Congress to express its intent by means other than specific statements in the repealing act.

CONCLUSION

This Court should grant Breier's Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

1. The Government asserts that the "decision of the court of appeals is correct." Brief for the United States in Opposition, at 7 (hereinafter, "Brief"). Breier vigorously disputes this conclusion and adopts by reference the arguments presented to this Court by amici curiae United States Senator James A. McClure and United States Representatives Harold Volkmer, Larry Craig, and Ron Marlenee.[1] Moreover, Breier notes that one of the three members of the panel of the court of appeals also disputed the decision of the panel and filed a strong dissenting opinion. See Appendix A, Petition for Writ of Certiorari.

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[1] Senator McClure and Representative Volkmer were the chief sponsors of the Firearms Owners Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986).

Of Senator McClure and Representative Volkmer's contentions regarding the application of the FOPA to cases such as the instant one, the contention that should be emphasized is that § 110(b) of the FOPA—which applied the amendments made by three provisions of the FOPA to proceedings "pending on the date of enactment" (not 180 days later)—simply established a different effective date for the three provisions enumerated in § 110(b). As explained by Senator McClure and Representative Volkmer, Congress intended that *all* the amendments made by the FOPA would apply to proceedings pending on the effective date of that particular amendment.[2]

2. Contrary to the Government's assertion, *United States v. Carter*, 801 F.2d 78 (2nd Cir. 1986), *cert. den.*, —— U.S. —— (1986), did not "address the issue" raised by Breier's Petition.

In the first place, *Carter* was *not*, unlike *Breier*, pending on November 15, 1986 as it was decided on September 11, 1986, two months earlier. Secondly, and more importantly, in writing that the FOPA amendment at issue in *Carter* would "not become effective until 180

[2] The Government's statement that "certain provisions of the FOPA were given retroactive application 'to any action, petition, or appellate proceeding pending on the date of enactment of this Act'" is illogical. In fact, § 110(b) gave immediate, not "retroactive," application of the three enumerated provisions to proceedings pending on the date of enactment. What the Government probably meant by the use of the word "retroactive" was that it views § 110(b) as requiring that the amendments made by the three provisions listed in § 110(b) would be the law that would apply in proceedings involving these three provisions which had commenced prior to the date of enactment of the FOPA; thus, the amendments would have retroactive effect in the sense that they would relate back to the date of the act which was at issue in the proceeding. That being the case, it follows, since § 110(b) expressly speaks only to the date of applicability, that all the other amendments made by the FOPA would also be the law that would apply in proceedings involving those provisions on their effective date: 180 days after the date of enactment.

days after enactment, i.e., November 15, 1986," the *Carter* court apparently concluded that the amendment "would not apply . . . retroactively" only because, as of the date of the court's decision, the amendment was not yet effective. Thus, *Carter* suggests that, had the case been decided *after* November 15, 1986, the court might have held that the amendment at issue *did* apply to the defendant.[3]

The primary thrust of the Government's second argument is that "the decision in this case does not conflict with the decision of the Eleventh Circuit in *United States v. Orellanes*, 809 F.2d 1526 (1987)." Brief, at 8. After reviewing the specific contentions made by Orellanes, the Government distinguishes what it refers to as the "three holdings by the court," Brief, at 9, from the language in the decision regarding the FOPA, asserting that the court "did not have to decide" the FOPA applicability issue and that the court's discussion of the FOPA was "unnecessary to the court's judgment." Brief, at 9. Thus, the Government does not in fact dispute that a genuine conflict now exists between the Ninth and Eleventh Circuits; rather, the Government attempts to show that the conflict could have been avoided by the Eleventh Circuit. That the Government believes the Eleventh Circuit "did not have to decide" the applicability of the FOPA is, however, of little moment since the Eleventh Circuit unanimously concluded that a determination of the applicability of the FOPA *was* necessary

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[3] While the Government refers to *Carter* as the "only other court of appeals to address the issue," it nonetheless also cites *United States v. Jackson*, 824 F.2d 21, 22-23, n.2 (D.C. Cir. 1987) and *United States v. Pennon*, 816 F.2d 527, 529 (10th Cir. 1987). Neither case is at all material to the instant case. In *Pennon*, the Tenth Circuit noted that the defendant did not raise the issue of the applicability of the FOPA; in *Jackson*, the court merely held that the FOPA's enactment of an enhanced penalty provision, 18 U.S.C. 924(e)(1), clarified the enhanced penalty's status as a sentencing provision.

to resolve the case. In sum, therefore, despite the Government's effort to minimize the conflict, *Orellanes is* in direct conflict with the panel majority in the instant case.

In addition to urging that *Orellanes* does not conflict with the Ninth Circuit's decision in the instant case, the Government urges that "review by this Court is unwarranted because of the diminishing importance of the issue." Brief, at 10. This assertion, however, is belied by the fact that prosecutions under the pre-FOPA Gun Control Act remain a very real possibility until November 15, 1991—over three and one half years from now—given that the statute of limitations for prosecutions under most provisions of the Gun Control Act is five years (18 U.S.C. 3282). Thus—as indeed the Government's tenacity in the instant case amply evidences—there is no reason to believe that prosecutions under the pre-FOPA Gun Control Act will not continue should this Court deny Breier's Petition. In fact, denial of Breier's Petition will send a clear message to the Government that prosecutions under the pre-FOPA Gun Control Act, except possibly in the Eleventh Circuit, should continue unabated for the next three and one half years.

3. The Government's final contention is that Breier's assertion that this Court has not established a clear analytical process for the federal courts to follow in applying the general saving provision, 1 U.S.C. 109, "is without merit." Brief, at 11. In the very next sentence, however, the Government nonetheless concedes that the "principles governing the abatement of criminal prosecutions" are only "*relatively* clear" (emphasis added) (Brief, at 11) an obvious admission that this Court has not established a sufficiently clear analytic process for the lower courts to follow in applying the general saving provisions.

In attempting to demonstrate that this Court's analytic process is sufficiently "clear" to warrant this Court's denial of Breier's Petition, the Government attempts to demonstrate that this Court's decision in *Hamm v. City*

of Rockhill, 379 U.S. 306 (1964) is consistent with this Court's prior decisions in *Hertz v. Woodman*, 218 U.S. 205 (1910) and *Great Northern Railway Company v. United States*, 208 U.S. 452 (1908). To do so, the Government, however, starts out by recognizing that in fact *Hamm did* establish a new analytical process for determining the applicability of 1 U.S.C. 109—i.e., whether an amendment to a penal statute "substitutes a right for a crime," 379 U.S. at 314—when it states that this Court's analysis in *Hamm* is "inapplicable here." Brief, at 12. Plainly, if *Hamm* were consistent with *Hertz* and *Great Northern Railway Company*, it would not be "inapplicable here"; rather, *Hamm* would be applicable but would lead to a conclusion favorable to the Government. Consequently, despite its contrary contentions, the Government recognizes that *Hamm* established a new and different analytic process from that which this Court had developed in *Hertz* and *Great Northern Railway*, a process which devolves upon the lower courts the requirement that they analyze whether an amendment to a penal statute "substitutes a right for a crime." [4]

In addition to its virtual recognition that *Hamm* created a new analytic process for applying the general saving provision, the Government completely failed to address the fact that *Hamm* also decided that the purpose of the general saving provision was "to obviate mere technical abatement . . . ." 397 U.S. at 314. The Government thus failed to demonstrate that *Hamm* was con-

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[4] It should be noted that such an analytic process would apply in the instant case since, in enacting the FOPA, the Congress expressly found that the FOPA was necessary "to correct existing firearms statutes and enforcement policies" because of "the rights of citizens . . . to keep and bear arms under the Second Amendment to the United States Constitution. . . ." § 1(b)(1). Indeed, the *Hamm* analytic process should apply more strongly in cases involving the FOPA since, unlike the Civil Rights Act of 1964—which this Court concluded, without relying on any findings of Congress, "substitut[ed] a right for a crime," and then only statutory rights —the FOPA includes an express congressional statement that its purpose was to protect constitutionally guaranteed rights.

sistent with *Hertz* and *Great Northern Railway Company*. Indeed, the Government did not make any effort to demonstrate that the "technical abatement" test—which leaves to the lower courts the determination of the question of whether an amendment to a penal statute is a "mere technical abatement"—establishes a clear guideline for the lower courts. Thus, particularly as it appears that this Court, in using the phrase "mere technical abatement," contemplated that amendments to penal statutes which made lawful conduct which was previously unlawful would not be affected by the general saving provision—an analysis inconsistent with *Hertz* and *Great Northern Railway Company*—this Court should grant Breier's Petition if for no other reason than to resolve this question.

Finally, the Government suggests that this Court's decision in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) made clear that *Hamm* "was not intended to mark a departure from the Court's traditional construction of the general saving clause . . . ." Brief, at 12. The Government, however, fails to note that *Pipefitters* did not overrule *Hamm*. As a result, the "substitutes-a-right-for-a-crime" analysis plainly retains at least some vitality. Moreover, the failure to overrule *Hamm* means that in some cases involving a non-technical amendment—i.e., an amendment that redefines what conduct is unlawful—the general saving provision would not be applicable. It should be added that the Government also failed to explain how the conclusion of *Pipefitters* that the general saving provision nullified abatement of the prosecution because the amending act "retains the *basic offense*" (emphasis added), 407 U.S. at 435, is consistent with this Court's prior decisions.[5]

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[5] Indeed, in *Pipefitters*, by inquiring whether an amendment to a penal statute "retains the basic offense," this Court not only appears to have approved *Hamm* but possibly to have created a *third* analytical process to be utilized in determining the effect of the general saving provision.

CONCLUSION

To allow Breier to benefit from Congress' recognition of the flaws of the Gun Control Act of 1968 and thus to carry out Congress' intent in enacting the FOPA, Breier's Petition for a Writ of Certiorari should be granted.

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